IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.3.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.188 of 1993
and C.M.P.No.18234 of 2003

V.Subramania Chettiar ..Appellant/Plaintiff

-vs-

1.V.K.Balasubramanian
2.V.K.Rathinam
3.K.B.Palaniappan ..Respondents/Defendants

First Appeal filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 25.10.1991 made in O.S.No.139 of 1988 on the file of the Sub Court, Villupuram.

For Appellant:- Mrs.Chitra Sampath

For Respondents:-
for R1 :-Mr.R.P.Kabilan
for R2 and R3:- No appearance

JUDGMENT

This appeal is filed against the Judgment and decree dated 25.10.1991 made in O.S.No.139 of 1988 on the file of the Sub Court, Villupuram in and by which the learned Subordinate Judge after analysing the evidence found that the plaintiff is not entitled to suit claim and accordingly dismissed the suit.

2. For convenience, the parties are referred as arrayed in the Original Suit. The brief facts of the case are as follows:-

3. Plaintiff states as follows:-

3.1. The suit property and certain other properties originally belonged to the joint family consisting of Gopalakrishna Pillai and his five sons viz., Rangasamy Pillai, Kannabiran, Balakrishnan, Pttabiraman and Varadarajulu. The said Gopalakrishna Pillai and each one of his five sons were entitled to 1/6th share in the suit

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property and other family properties. One of the said five sons Rangasamy Pillai filed a suit for partition of his 1/8th share in the family properties in the District Court of South Arcot in O.S.22/41 which was later on transferred to the file of Subordinate Judge, Cuddalore and numbered as O.S.34/43. The suit was ultimately decreed and preliminary decree for partition was passed in O.S.34/43 on 28.9.1943.

3.2. The suit property was included in that suit as item No.183. The preliminary decree passed in that suit was not followed up by final decree and hence there was no partition of properties by metes and bounds. The properties were continued to be enjoyed by all the shares jointly as tenants in common.

3.3. The said Gopalakrishna Pillai filed an Insolvency Petition in I.P.1/44 before the District Court, South Arcot District. The said Gopalakrishna Pillai was adjudged as an Insolvent in the said I.P.1/44 and his 1/6th share in all family properties vested in the Official Receiver, South Arcot. The share which was owned by the Insolvent Gopalakrishna Pillai in the suit property and certain other properties were sold in auction by the Official Receiver.

3.4. The 1/6th share in the suit property and certain other property was purchased by Chilakapathi Ammal wife of Aparanji Chettiar and was duly confirmed. The Official Receiver, South Arcot executed registered Sale-deed in respect of 1/6th share in the suit property and yet another item in favour of Chilakapathy Ammal on 29.3.1945.

3.5. The said Chilakapathy Ammal took delivery of the properties purchased by her through Court on 4.8.45 and the delivery effected through Court is evidenced by delivery receipt issued by the Court. The said Chilakapathy ammal was in enjoyment of the property purchased by her in her own right. She had leased out the hut situate in suit property to one Govindasamy Padayatchi. The right of Chilakapathy Ammal's 1/6th share in the suit property based upon the purchase made by her from the Official Receiver in I.P.1/44 and also her enjoyment of the same have been recognized, accepted and affirmed in subsequent court proceedings. The Municipal Assessment to the suit property has also been transferred in the name of Chilakapathy Ammal in recognition of her right and ownership of 1/6th share in the suit property and enjoyment of the same jointly along with other sharers.

3.6. The said Chilakapathy Ammal settled her 1/6th share in the suit property in favour of this plaintiff under registered document dated 20.8.1960. The plaintiff duly accepted the said settlement and is in possession of the 1/6th share in the suit property jointly with persons who own the remaining share in the suit property.

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Defendants 1 and 2 are entitled to the remaining share in the suit property. Plaintiff and defendants 1 and 2 are in enjoyment of the entire suit property jointly as tenants in common. The third defendant is using a small portion in the suit property as a garage with the permission of the shares. The suit property has not been divided by metes and bounds and the entire suit property is in joint possession of plaintiff and defendants.

3.7. Defendants 1 and 2 will be entitled only to the extent of shares of sons of Gopalakrishna Pillai by virtue of settlement executed in their favour by their father, V.D.Kannappa Mudaliar on 30.3.1962. The Court sale in favour of V.D.Kannappa Mudaliar on 18.4.1949 in E.P.115/48 in O.S.3/1919 is not valid and in any event it would not operate in respect of 1/6th share that belonged to Gopalakrishna Pillai which had been even prior to that sold in insolvency proceedings in I.P.1/44 in favour of Chilakapathy Ammal. The Official Receiver, South Arcot in whom the share of insolvency-Gopalakrishna Pillai had vested was not made a party to auction proceeding in E.P.115/48. The Execution proceedings in E.P.115/48 are not valued and in any event would not confer the interest of Gopalakrishna Pillai on V.D.Kannappa Mudaliar, the Court-auction purchaser in E.P.115/48.

3.8. The defendants 1 and 2 who claim through V.D.Kannappa Mudaliar therefore, cannot claim the interest or share of Gopalakrishna Pillai. As a matter of fact, the defendants realised the futility of their claim in respect of share of Gopalakrishna Pillai and therefore, have been enjoying the suit property jointly with plaintiff as tenants in common all these years.

3.9. In the settlement relied upon by defendants 1 and 2 they have been given only right to enjoy the property for their life time and the absolute estate vests in their respect sons. Defendants 1 and 2 are living with the respective sons as joint Hindu family. Hence, in this suit, defendants 1 and 2 have been impleaded as Manager of their respective families so as to obtain a decree which would be binding of their sons also.

3.10. The plaintiff is entitled to 1/6th share and the remaining share in the suit property belongs to defendants 1 and 2. As the plaintiff and defendants 1 and 2 are tenants in common and as division in status only had already taken place and as they are only aliens in respect of their respective shares claimed by them, the suit for partition of suit property alone is therefore maintainable. Hence the suit.

4. The written statement of the 1st defendant adopted by 3rd defendant reads as follows:-

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4.1. The defendants' father one V.D.Kannappa Mudaliar as a court auction purchaser in O.S.3/1919 has taken delivery of the suit property on 9.9.1949 through process of law in E.P.393/1949 of South Arcot District. He took delivery of only a vacant land. As on the date of delivery, there was neither a hut nor house. Ever since the date of delivery, it was only Kannappa who was in exclusive possession and enjoyment till he settled the same in favour of his sons i.e. Defendants 1 and 2 under a registered settlement deed dated 30.8.62. The said settlement is true, valid, duly attested and accepted and acted upon. This defendants and the 2nd defendant have taken possession and enjoyment of the same as absolute owners to the exclusion of all. Later they have purchased the eastern property and annexed with the suit property and divided the same among themselves. In or about 1974, eastern half was allotted to the second defendant, while this defendant was allotted the western side. This defendant is in possession and enjoyment of the western half as absolute owner thereof and he has prescribed titled by adverse possession also.

4.2. Thus it would be seen that the suit property had been in the exclusive possession and enjoyment of the defendants 1 and 2 and their father ever since 1949 until today, to the exclusion of every one inclusive of the plaintiff and his settler Chilakapathy Ammal. Chilakapathy as well as plaintiff were aware of the exclusive possession of the suit property by the defendants 1 and 2. They never asserted any right or title over them. There is no question of tenancy in common as the defendants 1 and 2 and the plaintiff are utter strangers. Neither the plaintiff was ever in joint possession of the suit property. He never came near the suit property.

4.3. The defendants 1 and 2 had been in possession of the suit property in their own right for well over the statutory period. They have also prescribed title by adverse possession and ouster. The possession of the defendants 1 and 2 and their father in open hostile and adverse ever since 9.9.1949 as against the whole world inclusive of Chilakapathy and the plaintiff and hence they have prescribed titled by ouster and adverse possession. There is no question of any tenancy in common as this defendant's father was a court auction purchaser who had taken exclusive possession of the suit property on 9.9.1949.

4.4. This defendant has permitted the 3rd defendant to have a garage in a small partition and he is using the same as a garage. Hence, the suit is liable to be dismissed.

5. Written statement of the second defendant reads as follows:-

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5.1. The decree in O.S.No.3/1919 was earlier than the insolvency proceedings and therefore all the proceedings in that suit culminating in court auction sale are valid in law and binding on Gopalakrishna Pillai who was personally a party to that suit and the proceedings and who was the judgment debtor No.1. His sons Rangasamy Pillai and Kannabiran Pillai were also parties to the decree and the execution proceedings. The Official Receiver, South Arcot was not a necessary party to the execution proceedings in E.P.No.115/48 of West Tanjore District Court in O.S.No.3/1919 on the file of District Court, Cuddalore and therefore the plaintiff cannot question the court auction sale in favour of V.D.Kannappa Mudaliar. Considering the nature of the execution proceedings in E.P.No.115/48 aforesaid the court auction sale in favour of V.D.Kannappa Mudaliar of the entire suit property is perfectly valid and binding on the estate of Gopalakrishna Pillai. It is too late in the day for the plaintiff to question the same.

5.2. The defendants 1 and 2 are not joint and undivided. They have already divided their properties along with the property on the east which they jointly purchased from one Chellammal on 19.9.1960.

5.3. V.D.Kannappa Mudaliyar purchased the suit propety in the Court auction sale as stated above, as early as 18.4.1949 and he took possession of the suit property through court. Ever since then Kannappa Mudaliyar was in exclusive possession and enjoyment of the suit property as full and absolute owner. V.D.Kannappa Mudaliyar settled the entire suit property upon the defendants 1 and 2 their issues on 30.3.1962. Since then, the defendants 1 and 2 were in exclusive possession and enjoyment of the suit property a full and absolute owners. The defendants 1 and 2 purchased on 19.9.1960 the eastern property measuring 35' from east to west and 30' from north to south from Chellammal by means of registered sale deed for value. They tacked on the above property to the suit property and they were enjoying the entire property as their own property.

5.4. Subsequently, they put up compound walls around the entire property in or about 1974. Later they divided the eastern property and the suit property between themselves. This defendant constructed a pucca building, rather a mansion in his share of 42'6" on the eastern side and celebrated the house-warming function towards the end of 1974. since then, this defendant has been in exclusive possession and enjoyment of the eastern property of 35' purchased from Chellammal and 7'6" from east to west out of the suit property on its eastern side. The remaining portion of the suit property on the west measuring 42'6" from east to west is in possession of the defendants 1 and 3. Thus, this defendant has acquired and perfected his title to the eastern portion of the suit property measuring 7'6" by adverse possession and ouster for more

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than 12 years prior to suit even supposing that the plaintiff ever had any right title or interest in the suit property and that she was a co-sharer. The suit is therefore bared by limitation. Hence, the suit is liable to be dismissed.

6. Plaintiff examined as P.W.1. One Thiru.Shanmuga Achari was examined as P.W.2. One Thiru.Balasubramaniam was examined as D.W.1. And one Thiru.Rathinam was examined as D.W.2. Ex.A.1 to Ex.A.17 were marked on the side of the plaintiff. Ex.B.1 to Ex.B.44 were marked on the side of the defendants to confront the claim of the plaintiff.

7. Heard Mrs.Chitra Sampath, learned counsel for the appellant and Mr.R.P.Kabilan, learned counsel for the first respondent.

8. Upon hearing the rival claims, the points for determination are:-

1)Whether the settlor of the suit property viz., V.D.Kannappa Mudaliar, father of the defendants had purchased the suit property in court auction in E.P.No.115/48 on 2.3.49. As per Ex.B.1?

2)Whether the defendants are the owners of the suit property in pursuance of the settlement deed Ex.B.43 in their favour.

3)Whether the defendants purchased the property on the east of the suit property from Chellammal and annexed the same to the suit property and put up construction thereon and thereafter, partitioned the same among them?

4)Whether the plaintiff and defendants 1 and 2 are in enjoyment of the suit property jointly as tenants in common?

5)Whether the finding of the lower court in dismissing the suit is in order?

9. Point No.1 to 4:-

9.1. Admittedly, the suit property belong to one Gopalakrishna Pillai. There was a money decree in O.S.3/1919 against Gopalakrishnapillai and his sons. During the pendency of the said proceedings, Gopalakrishna Pillai created an usufructuary mortgage under Ex.A.6 on 4.4.34 in favour of Chilakapathyammal. Though the sons of Gopalakrishna Pillai who were debtors of the decree in O.S.3/1919 filed a suit for partition and obtained decree for the same in O.S.34/1943. The suit in O.S.No.34/1943 was filed only after a valid decree in O.S.3/1919. The debtors in O.S.No.3/1919 are parties in O.S.No.34/1943. Ex.A.14 is the partition decree. But the said partition decree was not given effect to. The preliminary decree was not proceeded further. Therefore, there is no valid decree in O.S.No.34/1943 in the eye of Law.

9.2. In the mean time, Gopalakrishna Pillai was declared as insolvent in I.P.No.1/44 after a valid decree against him in O.S.No.3/1919. The rights of Gopalakrishna pillai was sold by the

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Official Assignee. Ex.A.2 is the sales certificate in favour of Chilakapathy ammal which is the usufructuary mortgage under Ex.A.6. It was happened on 29.3.1945. In the mean time, the decree holder in O.S.3/1919 filed E.P.115 of 1948 for the sale of the suit property.

10. The father of the defendants V.D.Kannappa Mudaliar had purchased the suit property in entirety in the court auction in the said E.P.115/48 on 2.3.1949. Sales Certificate is Ex.B.1.

11. In pursuance of the sale certificate, Mr.V.D.Kannappa Mudaliar taken delivery of the suit property as per EX.B.2. The suit property was shown as vacant site. In the mean time, the said Chilakapathiammal had conveyed her interest viz., 1/6th share in the suit property in favour of the plaintiff by a settlement deed dated 20.8.1960 which is Ex.A.1. Similarly, the said V.D.Kannappa Mudaliar settled the suit property under deed of settlement dated 30.3.1962 in favour of the defendants. Ex.B.43 is the settlement deed.

12. Defendants have purchased the property on the eastern side of the suit property from Chellammal and annexed the same with the suit property and also put up a building thereon.

13. In or about 1974, the defendants divided the property under their enjoyment, in which eastern half share allotted to 2nd defendant and the western half was allotted to the 1st defendant. The defendants are paying necessary property tax for the suit property. Defendants also filed property tax receipts to prove that the suit property is in their enjoyment. They have also performed, House Warming ceremony for the new building on the suit property. Ex.B.44 is the invitation.

14. Learned counsel for the appellant/plaintiff contended that the sale in favour of V.D.Kannappa Mudaliar in respect of suit property as per order dated 2.3.1949 in E.P.115/48 is void as 1/6th share of the suit property was vested with Official Assignee in I.P.No.1/44. It was further contended that without impleading the Official Assignee in E.P.115/48, court auction in respect of suit property is not valid in law. He also relied on the decision reported in AIR 1954 Madras 605 in the case of Subbiah Vs. Ramasami in support of their contention.

15. Learned counsel for the respondents/defendants would contend that even according to the plaintiff's pleadings, the said official receiver was not having any right over 1/6th share of the suit property, on the date of the sale of the suit property on 2.3.1949 in favour of V.D.Kannappa Mudaliar as alleged right was

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already sold by the Official Assignee as early as on 29.3.1945 as per Ex.A.2.

16. Submissions of the counsels in this regard is considered in detail. Even according to the plaintiff as early as on 29.3.1945, the Official Receiver has no control over the suit property, as the alleged right of 1/6th share of GopalaKrishna Pillai was purchased by the said Chilapavathi Ammal by court auction sale by the Official Receiver. It is worthy to note that the decree holder in O.S.3/1919 was nothing to do with the I.P. Proceedings. In fact, the debtor viz., Gopalakrishna Pillai, according to the plaintiff was declared as insolvent in I.P.1/1944. The other debtors viz., sons of Gopalakrishna Pillai in O.S.3/1919 have filed a partition suit and obtained a decree as per Ex.A.14 and not prosecuted subsequently. The facts concerned in the above said ruling is with reference to suit on mortgage between the mortgagor and the mortgagee. In that process only, mortgagor was declared as insolvent. The mortgagor was declared as insolvent when the rights of the parties was under adjudication in the mortgage suit. In such context only, it was held that not impleading the Official Receiver in the mortgage suit vitiates the court proceedings in respect of the sale of the property under dispute in that case.

17. The case on hand is totally different. On the date of sale of the suit property in Court auction viz., on 2.3.1949, the alleged Official Assignee in I.P.1/44 has no control/right in respect of the suit property. In such view of the fact, I am of the considered view that the contention of the learned counsel for the appellant is bereft of merit.

18. The documents filed in this case would show that defendants are in possession and enjoyment of the suit property. Plaintiff is not in possession of the suit property. The only submission made in this regard is that the plaintiff has got 1/6th share in the suit property in pursuance of the sale transaction as per Ex.A.2 and therefore, claims joint possession in respect of 1/6th share along with defendants share.

19. Even according to the plaintiff as per Ex.A.6, she was in possession of suit property. Whereas, as per Ex.B.1, the said V.D.Kannappa Mudaliar, father of the defendants took possession of the suit property as early as on 2.3.1949. Thereafter, he settled the suit property in favour of the defendants as per Ex.B.43 as early as on 30.3.1962. Moreover the defendants have purchased the eastern side of the suit property from Chellammal and annexed the same with the suit property and put up a construction thereon and are enjoying the same. This fact was not disputed by the plaintiff. If that be so, in the ground reality, if the said Chilakapathy Ammal was in possession of the suit property as early as on 4.4.1934, she

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should have been dispossessed from the suit property by virtue of order dated 2.3.1949 in E.P.115/1948. The sale certificate is Ex.B.1.

20. If the said Chilakapathy Ammal was not dispossessed of suit property by virtue of Ex.B.1, she should have been in possession of the same till she executes the settlement deed dated 20.8.1960 in respect of the suit property in favour of the plaintiff as per Ex.A.1. If that be so, the plaintiff will be in physical possession of the suit property in entirety in pursuance of Ex.A.1. In that case, there was no necessity for the plaintiff to file the present suit for partition.

21. However, the plaintiff claims only joint possession in respect of 1/6th share of the suit property. Such a submission is contra to his own pleadings. When the plaintiff claims joint possession of 1/6th share along with tenant in common, it goes without saying that the plaintiff is not in possession of the suit property. If that be so, the said V.D.Kannappa Mudaliar took possession of the suit property in entirety as per Ex.B.1 as early as on 2.3.49 itself, cannot be stated to be contrary to facts.

22. The learned counsel for the appellant would further contend that as Chilakapathy Ammal already purchased 1/6th share of the suit property by virtue of the court auction sale dated 29.4.1945 as per Ex.A.2 and hence, the sale of the entire suit property including share of Gopalakrishna Pillai as per Ex.B.1 is not valid in law. The learned counsel for the appellant further contended that the said V.D.Kannappa Mudaliar had obtained right only with reference to 5/6th share by virtue of Ex.B.1. In ground reality, such a submission is bereft of any merit in view of the fact that the said V.D.Kannappa Mudalier purchased the suit property in entirety as per Ex.B.1. If the sale in respect of 1/6th share of Gopalakrishna pillai to be held invalid, it is only for the plaintiff to file a suit for a declaratory relief and sustain his claim.

23. Since the purchase of the suit property in entirety as per Ex.B.1, by V.D.Kannappa Mudaliar, it cannot be stated that the said Kannapapa Mudaliar was a tenant in common along with Chilakapathy Ammal, as she had right over the suit property to the extent of 1/6th share as per Ex.A.2. The documents filed in this case would show that Chilakapathy Ammal claims independent right in respect of 1/6th share of the suit property in pursuance of Ex.A.2. Whereas the said V.D.Kannappa Mudaliar claims absolute right over the suit property in pursuance of the documents namely Ex.B.1 and B.2. The said V.D.Kannappa Mudaliar claims in his own right independently and in pursuance of the same, he settled the suit property in favour of the defendants as per Ex.B.43.

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24. Viewing the facts in entirety, I am of the considered view that the plaintiff and the defendants are not the tenants in common in respect of the suit property. As on date, the suit property is not available for partition in ground reality. The suit property was annexed with the eastern side of the property purchased by the defendants from one Chellammal. Thereafter, a building was also constructed not only in the suit property but also in the property annexed with the suit property.

25. The defendants also partitioned the properties in their enjoyment including the suit property among them. Eastern half is under the enjoyment of the 2nd defendant, Western half is under the enjoyment of the first defendant. Taking note of this point also, it is apparent that the plaintiff and the defendants are not tenants in common in respect of the suit property.

26. The narration of the events would prove that the plaintiff is not entitled to suit claim as prayed for. The lower court has also dealt these points in detail and accordingly dismissed the suit. I find no illegality or impropriety in the finding of the lower court in this regard. Accordingly, these points are answered against the plaintiff.

27. Point No.5:- In view of the findings rendered in points 1 to 4, I am of the view that the finding of the lower court is in order and does not require any interference.

28. In the result, the appeal fails and the same is dismissed. Consequently, C.M.P.No.18234 of 2003 is also dismissed.

nvsri

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The Sub Court, Villupuram.

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Judgment
in A.S.No.188 of 1993

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